

## **STATE'S RESPONSE TO DEFENDANT'S MOTION FOR SPECIFIC ENFORCEMENT OF PLEA AGREEMENT**

The State offered a plea to "attempted leaving the scene" and the defendant signed it, but the trial court deferred acceptance until sentencing. In the meantime, the State discovered that there was no such charge and asked to withdraw from the plea. When the trial court had not accepted the guilty plea and the defense had suffered no detriment, the State could withdraw from the plea.

The State of Arizona, by and through undersigned counsel, requests this Court to deny the defendant's Motion for Specific Enforcement of Plea Agreement, for the reasons set forth in the following Memorandum of Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **FACTS:**

On September 11, 1996, Deputy County Attorney Jamal Allen offered a plea agreement to the defendant (see attached). The offer was to amend Count 1 from leaving the scene of a fatal accident, a class 4 felony, to attempted leaving the scene of a fatal accident, a class 5 felony. The proposed plea included stipulations that the defendant would be placed on supervised probation and that the defendant should pay \$1,700 to the victim's family as restitution for funeral expenses. The defendant, his counsel, and Deputy County Attorney Allen signed the plea agreement on September 11, 1996.

On September 26, 1996, the Honorable Nancy K. Lewis heard the factual basis for the plea and determined that the defendant was entering the guilty plea knowingly, intelligently, and voluntarily. Judge Lewis, acting as a judge *pro tem*, deferred the acceptance of the plea of guilty to the time of sentencing, which was scheduled for October 25, 1996. Judge Lewis also requested that the Adult Probation Office prepare a

presentence investigation and report. On October 20, 1996, pursuant to a request by the Adult Probation Office, sentencing was continued until November 15, 1996.

In the meantime, the case was reassigned to Deputy County Attorney Tina Combs, who became aware that “attempted leaving the scene” is not a valid offense. The State also examined the merits of the case and the reaction of the victim’s family to the agreement. On November 15, 1996, the State asked the Court to allow the State to withdraw the plea offer; the court agreed. The defendant now asks this Court to specifically enforce the State’s original plea offer.

**LAW:**

A plea bargain is not final until the defendant pleads guilty and the court accepts the plea and enters it of record.

A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

*State v. Georgeoff*, 163 Ariz. 434, 436-37, 788 P.2d 1185, 1187-88 (1990), quoting *Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984).

Rule 17.4(b), Arizona Rules of Criminal Procedure, states:

The terms of a plea agreement shall be reduced to writing and signed by the defendant, the defendant’s counsel, if any, and the prosecutor. An agreement may be revoked by any party prior to its acceptance by the court.

The defendant has no right to any plea offer and the State has no obligation to make any plea offers at all, much less any specific plea offer.

It is well settled that criminal defendants have no constitutional right to a plea agreement and the state is not

required to offer one. See *State v. Draper*, 162 Ariz. 433, 440, 784 P.2d 259, 266 (1989); *State v. Morse*, 127 Ariz. 25, 31-32, 617 P.2d 1141, 1147-48 (1980). Furthermore, a plea bargain can be revoked by any party, at any time, prior to its acceptance by the court. *Id.*; Ariz. R. Crim. P. 17.4(b) and (d).

*State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996).

Pro Tem Judge Lewis deferred acceptance of the guilty plea until the scheduled sentencing date, October 25, 1996. On the Adult Probation Department's request, the court continued sentencing to November 15, 1996. At that time, before Judge McDougall accepted the plea, the State requested to withdraw. The prosecutor brought to the court's attention that "attempted leaving the scene" is not a valid charge. Therefore, a plea of "attempted leaving the scene" was not an appropriate resolution to the charge, and the prosecutor properly informed the court of that fact. As the Court of Appeals stated in *State v. Pierce*, 116 Ariz. 435, 438, 569 P.2d 865, 868 (App. 1977):

[A] guilty plea must be viewed as a final step rather than as a prelude to a new phase of litigation. A guilty plea is a full and final resolution and disposition of criminal charges. In accordance with this basic concept, if counsel knows of any reason or circumstance that might impugn the validity of a plea, he should call the matter to the attention of the court prior to the taking of the plea.

Accord, *State v. Draper*, 162 Ariz. 433, 440, 784 P.2d 259, 266 (1989). The Court, in its minute entry dated November 15, 1996, followed Rule 17.4(b), *Draper*, and *Pierce*, and allowed the State to withdraw.

The defendant would have the court believe that the State "induce(d) him to waive a preliminary hearing in exchange for a plea agreement with which the State, apparently, had no intention of complying." The State contends that the State never offered the defendant any inducement to waive the preliminary hearing. The "waiver"

language printed on the Waiver of Preliminary Hearing with Plea Agreement form is merely a formality that shows why the preliminary hearing did not occur. An acceptance of a plea at that point in time would mean that there would be no preliminary hearing. It is not mandated nor is the plea offer made contingent on the defendant's accepting the offer. The State never made any expressed or implied statement suggesting that the plea offer was contingent on waiving a preliminary hearing, so the defendant could not have relied on any such statement in determining to enter a guilty plea.

The cases the defendant has cited are all cases in which the defendant relied upon the plea agreement to his detriment. The only "detriment" that the defendant has alleged is that he waived a preliminary hearing. But because the State made no express or implied promise to drop the preliminary hearing, there was no promise for the defendant to rely upon. Nor can the State use the defendant's guilty plea statements against him in any fashion. Rule 17.4(f), Ariz. R. Crim. P., provides that if a plea agreement is revoked, "neither the plea discussion nor any resulting agreement, plea or judgment, nor statements made at a hearing on the plea, shall be admissible against the defendant in any criminal or civil action or administrative proceeding." Therefore, the defendant suffered no detriment from his original decision to accept the original plea offer.

#### **CONCLUSION:**

For all of the above reasons, the State respectfully requests this Court to deny the defendant's Motion for Specific Enforcement of Plea Agreement.